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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 706

CITIZENS ICE AND COLD STORAGE COMPANY, ET AL.,

Petitioners,

vs.

THE ATLANTIC COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I

Summary Statement of the Matter Involved

(1) Nature and History of the Case

This is an action at law brought in the United States District Court for the Middle District of Georgia by Citizens Ice and Cold Storage Company, (Citizens), Crystal Ice

Company, (Crystal), and Flint River Mills, Inc., (Flint River), petitioners herein, against The Atlantic Company, respondent herein, for the recovery of treble damages and for an injunction to restrain alleged violations of §2 of the Sherman Anti-Trust Act (26 Stat. 209, 15 U.S.C.A. §2) and § 3 of the Robinson-Patman Act (49 Stat. 1528, 15 U.S.C.A. §13a) (R. 3-18, 23-25). On interlocutory hearing the District Judge rendered in favor of petitioners against the respondent an order enjoining the respondent as prayed in the petition (R. 77-82). An appeal from said order was taken by the respondent to the Court of Appeals for the Fifth Circuit (R. 82, 83). The question presented upon the appeal was whether, upon a proper application of §2 of the Sherman Anti-Trust Act and §3 of the Robinson-Patman Act (15 U.S.C.A. §§2, 13a) to the facts, when taken and construed in favor of the petitioners' claims, the District Court was authorized to conclude that the respondent had violated the provisions of either or both of the foregoing Acts. Answering this question in the negative, the Circuit Court reversed the grant of the interlocutory injunction and remanded the case to the District Court for further and not inconsistent proceedings.

(2) Statutes Involved

Section 2 of the Sherman Anti-Trust Act (15 U.S.C.A. §2) provides that

> "Every person who shall monopolize, or attempt to monopolize, . . . any part of the trade or commerce among the several states, . . . shall be deemed guilty of a misdemeanor."

Section 3 of the Robinson-Patman Act (15 U.S.C.A. §13a) provides that

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce . . . to sell,

> . . . goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States with the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

(3) Contentions of the Parties

It was the petitioners' contention that respondent was engaged in interstate commerce in the manufacture, sale and distribution of ice in a great many cities and towns in Georgia, including Colquitt and Bainbridge, and in other southeastern states; and that the respondent had cut its price of ice to 20¢ per 100 pounds for both ice sold at its platform and delivered; that this was substantially lower than the price at which the respondent sold ice elsewhere; that the price was an unreasonably low price resulting in a loss to the respondent as a result of such sale, and that the respondent's conduct in reducing the price of its ice as stated was done for the purpose and with the intent of destroying competition and eliminating petitioners as competitors with the intent to establish a monopoly, all in violation of §2 of the Sherman Anti-Trust Act and §3 of the Robinson-Patman Act (15 U.S.C.A. §§3, 13a).

It was the respondent's contention in substance that all of its activities in the sale of its ice were in intrastate commerce and local in character and that none of its activities were, therefore, in interstate commerce or committed in the course of such commerce; that the reduction in its prices was not made to destroy competition but was done so as to meet competition of the petitioners and to preserve its business, and that, even assuming that sales of ice to truckers and railroads, though made locally, could be said to be in, or in the course of, interstate commerce, they were completely insignificant when compared to the total business

done and that it could not be reasonably found that its act in cutting prices was begun and carried on with the intent or effect of monopolizing interstate commerce, in violation of the Sherman Act, or of destroying competition and eliminating competitors in the course of interstate commerce, in violation of the Robinson-Patman Act.

(4) The Facts

(a) The Price Cuts

The respondent is, among other things, engaged in the manufacture and sale of ice in many cities in the State of Georgia as well as in many other southeastern states (R. 44, 54). One of these plants at which ice is manufactured and sold is in Bainbridge, Georgia (R. 27), a city located in the extreme southwestern part of the State. It has a capacity of approximately 40 tons a day or 1200 tons a month (R. 44). Another plant at which ice is sold, though manufactured at other plants of the respondent within the State of Georgia, is located in Colquitt, Georgia, which is near Bainbridge and likewise situated in the southwestern part of the State (R. 47). Prior to 1947 respondent had no competition in Colquitt and none in Bainbridge except Flint River, which dealt in ice only and in a very small way (R. 38, 45, 48, 51, 70).

In July, 1947, Citizens Company opened a plant in Bainbridge for the manufacture and sale of ice (R. 29), having a capacity of approximately 15 tons a day (R. 43, 70). Shortly before Citizens completed its plant and was open for business, the respondent reduced its price for ice per hundred pounds from 40¢ on the platform and 50¢ delivered to 30¢ on the platform and 40¢ delivered (R. 13, 20). Shortly after Citizens opened for business, the respondent reduced its price for ice per one hundred pounds to 20¢ both on the platform and delivered (R. 27, 28). Citizens sold

its ice per hundred pounds at 40¢ delivered and 30¢ on the platform. (R. 46). The Flint River sold its ice for 40¢ its platform,—it not being engaged in the delivery of ice (R. 6, 20, 29).

When Crystal opened its plant in Colquitt in 1946, respondent was selling its ice at a price per hundred pounds of 50¢ delivered and 25¢ on platform as compared with a price of 50¢ delivered and 40¢ on platform charged by Crystal (R. 47, 48). Thereafter, respondent cut its price to 30¢ delivered and 20¢ on the platform.

Elsewhere in Georgia the respondent was selling ice at a price per hundred pounds of 50¢ at the platform and 60¢ delivered (R. 31). In September, 1947, Citizens sold 362.45 tons as compared to 238.82 tons for the same month in 1948, and in the month of October, 1947, sold 310.13 tons as compared to 125.28 tons sold in the same month in 1948. This reduction in sales was attributable almost in its entirety to the reduction in price of ice by the respondent to 20¢ per hundred pounds (R. 32).

(b) The Purpose and Intention of Respondent in Cutting Prices

Respondent lost money on all ice sold at the Bainbridge Division after the price of ice was cut to 20¢ (R. 28). It also lost money on some of the ice marketed in Colquitt (R. 33, 34) although it does not affirmatively appear that money was lost on the entire ice sales at that point (R. 74). In 1946, while Crystal was in the process of erecting its plant, one of the owners of Crystal was approached by the Division Manager of respondent who asked him why he didn't take the easy way out and, when asked what was meant by taking the easy way out, was informed that the respondent would give him what he had in the building, if he wanted to sell. This offer was declined and the Division Manager again repeated that he should do it the easy way (R. 33).

In 1948, one of the owners of Crystal talked with the President of the respondent in Atlanta and asked why the respondent wouldn't raise the price of ice so they could all make a living. The President replied that he was satisfied with things as they were, but let it be known that respondent would be interested in purchasing Crystal's plant (R. 32, 33). While the Citizens plant was under construction, the then Manager of the respondent at Bainbridge warned one of the owners of Citizens, through his nephew and as a friend, not to put his money in the ice business competing with the respondent because he had worked for the respondent and he knew them, and that if competitive business started, that the respondent would start cutting prices and break him (R. 76). Prior to the time that respondent cut its price of ice to 20¢, the Division Manager of the respondent asked the Manager of the Bainbridge plant what it would take to whip Citizens, that they were selling entirely too much ice. He was told that it would take better service, and as a result the Bainbridge plant was given two additional trucks. Shortly thereafter, the Division Manager of respondent was again in Bainbridge, at which time the sales of the respondent had shown a slight increase. At about this time the Bainbridge plant was given two more trucks, the Division Manager stating that if this did not work he would try something else. About two weeks later, he called the Manager over the telephone and said as of then to cut the price of ice to 20¢ per 100 pounds both on the platform and delivered (R. 27, 28).

The respondent introduced affidavits of its officers to the effect that the price cutting was done to meet the competition of Citizens at Bainbridge and Crystal at Colquitt, both being locally owned enterprises by locally prominent people and the plants of which were better located for service than those of the respondent, and showed that its ice sales

declined in both places after Citizens and Crystal opened their plants (R. 37-43, 44-47, 47-50).

(c) Sales Made in Interstate Commerce

Shortly after the price of ice was cut to 20¢ and in accordance with instructions from the Division Manager, the respondent erected a sign on the Tallahassee (Florida) Highway and a sign on Calhoun Street in the City of Bainbridge, which is the truck route designated by the City of Bainbridge to be used by trucks traveling U. S. Highways 27 and 84, advertising ice to "truckers" at $4.00 a ton (R. 28, 31). After the officers of the respondent in Bainbridge heard that they were going to be sued about cutting prices, the President of the respondent came to Bainbridge and told them to wait a few days and let the sign on the Tallahassee Highway disappear some night; that there was no need to take down the sign on Calhoun Street, they (meaning petitioners) had already made pictures of it. At that time the President had one of the employees type out a form which gave the tag number and State of registration of each truck that they iced up, the place from which the truck was going and the destination of the truck. These forms all showed the destination to be in Georgia and contained a statement thereon that the ice furnished would not be transported out of the State, and the President stated that if the drivers would sign the form, it would clear the respondent; that the respondent "had been through stuff like this before, and for us to do the work and he would do the worrying" (R. 29, 34). There was evidence indicating that these records as kept by the respondent did not reflect the true facts (R. 35-37). According to a former employee of the respondent, both before and after the signs advertising ice to truckers were put up, different trucks from out of the City would come in and be iced up at the plant (R. 28).

According to an officer of the Flint River, frequently, and within the week previous to the making of his affidavit, he had seen produce trucks being iced up by the respondent with I. C. C. tags and also tags of several States, including Florida and Alabama, thereon, and that from his own knowledge trucks of that type are engaged in interstate commerce (R. 30). According to one of the owners of Citizens, a former Manager of respondent's plant in Bainbridge, from 1940 to 1942, at least 15 interstate trucks are iced up in Bainbridge, Georgia, each week during the produce and fruit season, and each truck would average in the vicinity of a ton of ice, and a majority of them were being iced by the Atlantic Company (R. 32). A former employee of the Seaboard Air Line Railway Company at Bainbridge stated that up until 1945, when he retired, the Seaboard Air Line Railway Company purchased approximately 1000 pounds of ice a day for the purpose of icing and re-icing trains at Bainbridge, these trains running from the State of Georgia into Alabama and from the State of Georgia into Florida, and that from his information, belief and knowledge, that company still buys ice from the respondent in approximately the same quantity (R. 66). A wholesale dealer in chickens operating from Bainbridge, Georgia, to Tallahassee and other points in Florida and averaging 6 to 8 trips each week into Florida, stated in an affidavit presented by the petitioners that he purchased from 2000 to 2500 pounds of ice a week which he used in icing chickens that were shipped in interstate commerce. In an affidavit of the same party presented by the respondent, he stated that he purchased from 4000 to 5000 pounds of ice per week from the respondent. Sometimes he purchased the ice and took it to his place of business in Bainbridge and iced the chickens there; frequently he brought the chickens to the respondent's place of business and iced them at that point, and sometimes he iced chickens partially at his place of

business and partially at respondent's place of business (R. 69, 70, 74, 75).

Previous to Citizens opening its plant, respondent sold approximately 9000 tons of ice a year at Bainbridge (R. 39). From July, 1946 through May, 1947, prior to Citizens opening in July, 1947, respondent sold 7114 tons. From July, 1947, through May, 1948, respondent sold 6932 tons. (R. 41)

Respondent introduced evidence that from its records for a period from January 1, 1948, to the end of June, 1948, the respondent's plant at Bainbridge sold a total of 3806 tons, and that during that period the total amount of ice sold by respondent to truckers for the purpose of icing trucks, hauling fruit, vegetables and produce, amounted to only 34.2 tons. (R. 70, 71)

(5) The Ruling of the District Court

The District Court held in substance that under the evidence the respondent sold ice to different parties to be used in refrigerating cars and trucks which were transporting goods in other states and that as such the respondent was engaged in commerce and such sales were made in the course of such commerce; that the respondent did continuously, prior to bringing of the instant suit, cut the price of ice and caused, and did intend to cause, loss to petitioners as stated in the petition and that the respondent attempted to monopolize the ice industry in Bainbridge and Colquitt and surrounding territories; that the respondent sold ice at Bainbridge and Colquitt at prices lower than those exacted by the respondent at other places for the purpose of destroying competition and eliminating the petitioners as competitors, and that the respondent sold ice at unreasonably low prices for these purposes; that, therefore, the respondent was guilty of a violation of the Sherman Anti-Trust Act, Section 2, and the Robin-

son-Patman Act, section 3, (15 U.S.C.A. §§ 2, 13a) and, accordingly, enjoined the respondent from selling ice at a lower price than the average prices charged for similar ice at named towns in the State of Georgia where the respondent also had plants.

(6) The Decision of the Circuit Court

The Circuit Court, after setting out the contentions of the parties and summarizing the evidence, held as follows:

> "It may not any longer be doubted that the power of Congress and the scope of the Sherman Act's coverage 'extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.'[6] It remains true, however: that the distinction between intrastate and interstate commerce still exists; that 'it is the effect upon the interstate commerce or its regulation, regardless of the particular form which the competition may take, which is the test of federal power';[7] and that the question of whether the effect on interstate commerce is substantial is still a determining one.[8]

"[6] *U. S.* v. *Wrightwood Dairy Co.*, 315 U. S. at 119, 62 S. Ct. at 526, 86 L. Ed. 726; *Wickard* v. *Filburn*, 317, U. S. 111, 63 S. Ct. 82, 87 L. Ed. 122; *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 68 S. Ct. 996, 92 L. Ed. 1328.

"[7] *U. S.* v. *Wrightwood Dairy Co.*, 315 U. S. at 120, 62 S. Ct. at 526, 86 L. Ed. 726.

"[8] *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. at 234, 68 S. Ct. at 1005, 92 L. Ed. 1328; *U. S.* v. *Frankfort Distilleries*, 324 U. S. at 234, 297, 65 S. Ct. at 663, 89 L. Ed. 951, where it is said: 'It is true that this court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust Laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce.'"

"A consideration of the record in this case, with these considerations in mind, leaves us in no doubt that the evidence is not sufficient to support the conclusion on which the injunction was based, that in doing the acts complained of, the defendant was, in violation of the Sherman Act, attempting to monopolize a part of the trade or commerce among the several states, and, of the Robinson-Patman Act, cutting prices for the purpose of destroying competition and eliminating plaintiffs as competitors in the course of said commerce.

"We think it perfectly clear: that what, and all, that is made to appear is a war of local price cuttings; that its effect, if any, upon interstate commerce is insubstantial, inconsequential, and remote; and that the finding, that the price cutting was done to impose restraints on, or that it substantially affected interstate commerce, is without support in the evidence."

II

Reasons Relied On for the Allowance of the Writ

It is our belief that there are special and important reasons why the writ of certiorari should be granted to review the decision of the Circuit Court in this case.

The business of furnishing ice in connection with and for use in interstate traffic represents, in the aggregate, an important as well as a large industry in the United States. It supports and is an integrable part of a vast amount of interstate shipment of goods. The respondent is engaged in the manufacture and sale of ice in Georgia and other southeastern states. It is inferable that, generally speaking, all of its operations are local in that the ice is manufactured and sold at its various plants and that, due to the nature of the commodity, none is shipped across state lines for sale, although a part of the ice so manufactured at each plant may be used in connection

with interstate shipment of goods. This type of operation is no doubt general throughout the ice industry. Under the decision of the Circuit Court in this case, the respondent, as well as other manufacturers of ice, is left free to destroy and eliminate competition in the areas served by its various ice plants, notwithstanding the provisions of the Sherman Anti-Trust and Robinson-Patman Acts, simply because the ice itself is not shipped across state lines by the respondent for sale and because the amount of ice sold at a particular plant may be a small percentage of the purely local business done by that plant, and notwithstanding the respondent's efforts to establish a monopoly directly effects and threatens all of the interstate traffic in that particular area requiring the use of ice which, though not involving a great amount of commerce, is itself not wholly insubstantial. In this manner, the respondent is left uninhibited and by controlling through a monopoly many small areas of interstate traffic may and will, in the aggregate, control a large amount of such traffic. It is an important question whether small areas of interstate commerce such as that herein involved are to be protected by the Sherman Anti-Trust and Robinson-Patman Acts where the interstate traffic may be small but important and continuous and not sporadic or whether the Acts have to do only with large amounts of interstate commerce.

Insofar as the Circuit Court's opinion may be construed as holding that the respondent, in selling ice for use in connection with interstate commerce, was not engaged in interstate commerce, it is in conflict with *Hamlet Ice Co., Inc.* v. *Fleming,* (4 Cir.), 127 F. 2d 165, (cert. den. 320 U.S. 761); *Southern United Ice Co.* v. *Hendrix,* (6 Cir.), 153 F. 2d 689; *Atlantic Co.* v. *Walling,* (5 Cir.), 131 F. 2d 518,—see also *Fleming* v. *Atlantic Co.,* (D.C. N.D. Ga.), 40 F. Supp. 654; *Gordon* v. *Paducah,* (D.C. W.D. Ky.),

41 F. Supp. 980; and likewise contrary to the principles of the decisions of this Court in respect to what constitutes transportations in interstate commerce such as *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282, 42 S. Ct. 106, 67 L. Ed. 329; and *National Labor Relations Board* v. *Fainblatt,* 306 U.S. 601, 59, S. Ct. 668, 83 L. Ed. 1014; or as holding that the effect of respondent's attempt to establish a monopoly on such commerce was insubstantial, inconsequential, and remote, it is in conflict with recent decisions of this Court holding that any conduct having any relationship to interstate commerce is subject to the terms of the Sherman Anti-Trust Act if such conduct has any actual or threatened effect upon such commerce, such as *Mandeville Island Farms* v. *American Crystal Sugar Co.,* 334 U.S. 219, 68 S. Ct. 996, 68 L. Ed. 996; *United States* v. *Women's Sportswear Manufacturing Association,* 336 U.S. 460 at page 464, 69 S. Ct. 714 at page 716.

Insofar as the Circuit Court's decision may be construed as holding that, notwithstanding the respondent may have been guilty of an attempt to create a monopoly in a manner inhibited by the Sherman Anti-Trust and the Robinson-Patman Acts, its conduct was not proscribed by those acts because the volume of ice sold by the respondent for use in such commerce was small as compared with the amount of ice sold for local use, it is contrary to decisions of this Court such as *United States* v. *Eastern States Retail Lumber Dealer's Association,* 234 U.S. 600, 34 S. Ct. 951, 58 L. Ed. 1490; *National Labor Relations Board* v. *Fainblatt, supra,* 306 U.S. 601, 59 S. Ct. 668, 83 L. Ed. 1014; *United States* v. *Yellow Cab Co.,* 332 U.S. 618, 67 S. Ct. 1560, 91 L. Ed. 2010; *United States* v. *Paramount Pictures,* 334 U.S. 131 at page 173, 68 S. Ct. 915 at pages 936, 937; *United States* v. *Columbia Steel Co.,* 334 U.S. 495, 68 S. Ct. 1107, as well as being in conflict with the decisions of other Circuit Courts such as in *Steers* v. *United States,* (6 Cir.),

192 F. 1; *O'Brien* v. *United States*, (6 Cir.), 290 F. 185; *William Goldman Theatres* v. *Loew's, Inc.*, 150 F. 2d 738, since the conduct of the respondent would necessarily effect all of the interstate traffic requiring the use of ice in the area in question which could not be considered wholly insubstantial and its effect thereon was sufficiently substantial and adverse to Congress' paramount policy to constitute a forbidden consequence. *Mandeville Island Farms* v. *American Crystal Sugar Co., supra*, 334 U.S. 219 at page 234, 68 S. Ct. 996 at page 1005, 68 L. Ed. 996.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket Number 12,713, *The Atlantic Company, Appellant* v. *Citizens Ice & Cold Storage Co.*, et al., Appellees, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court may be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated: March 23, 1950.

JULIAN WEBB,
Donalsonville, Ga.,
Attorney for Petitioners.

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1. The respondent in selling ice to railroads and truckers engaged in the interstate transportation of goods, the use of ice being a necessary adjunct of such commerce, is engaged in interstate commerce and such sales are made in the course of such commerce so that § 2 of the Sherman Anti-Trust Act and § 3 of the Robinson-Patman Act (15 U.S.C.A. §§ 2 and 13a) are applicable thereto	23
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3. The evidence disclosed that the respondent sold ice in Bainbridge, Georgia, at prices lower than those exacted by the respondent elsewhere: that the price for which the respondent sold ice was unreasonably low and at a loss to the respondent: that this conduct was for the deliberate purpose and intention of suppressing competition by injuriously affecting petitioners	

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as competitors and of establishing a monopoly in the manufacture and sale of ice: and that the conduct of the respondent had resulted in serious losses to the petitioners and if continued would severely affect their ability to continue in the business of manufacturing and selling ice. It further appeared that there were some, though not a large, amount of interstate rail and motor vehicle traffic in and through Bainbridge which required the use of ice in such transportation and that the respondent sold ice to railroads and truckers in connection with such transportation. In these circumstances, it follows that the respondent was guilty of a violation of section 2 of the Sherman Anti-Trust Act and of section 3 of the Robinson-Patman Act (15 U.S.C.A. §§ 2, 13a) 23

4. It makes no difference with respect to the respondent's violation of the Sherman Anti-Trust Act and the Robinson-Patman Act, that the amount of sales of ice by the respondent was small with reference to the amount of its purely local sales since the alleged suppression of competition and violation of the specific terms of the Robinson-Patman Act directly impinged upon *all* of such transportation of the character in question involved in that area and the respondent can not find refuge for its violation of said acts upon the ground, as held by the Circuit Court, that its

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unlawful acts related only to its local sales and that the effect thereof on interstate commerce was insubstantial, inconsequential, and remote. In an action for a violation of the Sherman Anti-Trust and Robinson-Patman Acts the fact that the commerce involved may be small does not render these acts any less applicable thereto 24

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Interstate Commerce Act, 49 U.S.C.A. § 1 (3) 25

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

CITIZENS ICE AND COLD STORAGE COMPANY, ET AL.,

Petitioners,

vs.

THE ATLANTIC COMPANY,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

The opinion of the Circuit Court as reported in 178 F. 2d pp. 453-458.

II

Jurisdiction

1. The date of the judgment or decree to be reviewed is December 28, 1949.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is 62 Stat. 928, c. 646, June 25, 1948, 28 U. S. C. A. Sec. 1254.

3. This was an action for treble damages and injunction under the provisions of the Sherman Anti-Trust Act, Sec-

tion 2, and the Robinson-Patman Act, Section 3 (15 U. S. C. A. Secs. 2, 13a), wherein the District Court upon interlocutory hearing granted an injunction, which judgment was reversed by the Circuit Court.

III

Statement of the Case

This has already been stated in the preceding petition under I (pp. 1-11, which is hereby adopted and made a part of this brief.

IV

Specification of Errors

The Circuit Court erred in holding that the respondent's conduct did not amount to a violation of the Sherman Act, in attempting to monopolize a part of the trade or commerce among the several states, and of the Robinson-Patman Act, cutting prices for the purpose of destroying competition and eliminating petitioners as competitors in the course of said commerce; that all that was made to appear was a war of local price cuttings; that its effect, if any, upon interstate commerce was insubstantial, inconsequential, and remote; and that the evidence did not support the finding of the District Judge that the price cutting was done to impose restraint on, or that it substantially affected interstate commerce because (1) the respondent was engaged in interstate commerce and, even if technically not so engaged, its conduct had an actual or threatened effect upon interstate commerce, (2) because the conduct of the respondent in cutting prices for the purpose of eliminating competition and establishing a monopoly was in violation of the Sherman Anti-Trust Act, § 2, and the Robinson-Patman Act, § 3 (15 U. S. C. A. §§ 2, 13a), and (3) because the fact that the conduct of the respondent may not have, in the area in ques-

tion, involved a large amount of commerce does not relieve the respondent from the violation of said Acts.

V

ARGUMENT

Summary of the Argument

1. THE RESPONDENT IN SELLING ICE TO RAILROADS AND TRUCKERS ENGAGED IN THE INTERSTATE TRANSPORTATION OF GOODS, THE USE OF ICE BEING A NECESSARY ADJUNCT OF SUCH COMMERCE, IS ENGAGED IN INTERSTATE COMMERCE AND SUCH SALES ARE MADE IN THE COURSE OF SUCH COMMERCE SO THAT § 2 OF THE SHERMAN ANTI-TRUST ACT AND § 3 OF THE ROBINSON-PATMAN ACT (15 U.S.C.A. §§ 2 AND 13a) ARE APPLICABLE THERETO.

2. EVEN ASSUMING THAT THE SALE OF ICE FOR USE IN INTERSTATE COMMERCE IS NOT STRICTLY AN INTERSTATE TRANSACTION, IT IS CLEAR THAT ANY ATTEMPT TO MONOPOLIZE THIS BUSINESS WOULD AFFECT WHATEVER INTERSTATE TRAFFIC WAS INVOLVED, SUBSTANTIALLY, AND DIRECTLY, AND THAT SUCH CONDUCT WOULD CONSTITUTE A VIOLATION OF THE SHERMAN ANTI-TRUST ACT.

3. THE EVIDENCE DISCLOSED THAT THE RESPONDENT SOLD ICE IN BAINBRIDGE AND COLQUITT, GEORGIA, AT PRICES LOWER THAN THOSE EXACTED BY THE RESPONDENT ELSEWHERE; THAT THE PRICE FOR WHICH THE RESPONDENT SOLD ICE WAS UNREASONABLY LOW AND AT A LOSS TO THE RESPONDENT; THAT THIS CONDUCT WAS FOR THE DELIBERATE PURPOSE AND INTENTION OF SUPPRESSING COMPETITION BY INJURIOUSLY AFFECTING PETITIONERS AS COMPETITORS AND OF ESTABLISHING A MONOPOLY IN THE MANUFACTURE AND SALE OF ICE; AND THAT THE CONDUCT OF THE RESPONDENT HAD RESULTED IN SERIOUS LOSSES TO THE PETITIONERS AND IF CONTINUED WOULD SEVERELY AFFECT THEIR ABILITY TO CONTINUE IN THE BUSINESS OF MANUFACTURING AND SELLING ICE. IT FURTHER APPEARED THAT THERE WERE SOME, THOUGH NOT A LARGE, AMOUNT OF INTERSTATE RAIL AND MOTOR VEHICLE TRAFFIC IN AND THROUGH BAINBRIDGE WHICH REQUIRED THE USE OF ICE IN SUCH TRANSPORTATION AND THAT THE RESPONDENT SOLD ICE TO RAILROADS AND TRUCKERS IN CONNECTION WITH SUCH TRANSPORTATION. IN THESE CIRCUMSTANCES, IT FOLLOWS THAT THE RESPONDENT WAS GUILTY OF A VIOLATION OF SECTION 2

OF THE SHERMAN ANTI-TRUST ACT AND OF SECTION 3 OF THE ROBINSON-PATMAN ACT (15 U.S.C.A. §§ 2, 13a).

4. IT MAKES NO DIFFERENCE WITH RESPECT TO THE RESPONDENTS VIOLATION OF THE SHERMAN ANTI-TRUST ACT AND THE ROBINSON-PATMAN ACT, THAT THE AMOUNT OF SALES OF ICE BY THE RESPONDENT WAS SMALL WITH REFERENCE TO THE AMOUNT OF ITS PURELY LOCAL SALES SINCE THE ALLEGED SUPPRESSION OF COMPETITION AND VIOLATION OF THE SPECIFIC TERMS OF THE ROBINSON-PATMAN ACT DIRECTLY IMPINGED UPON *ALL* OF SUCH TRANSPORTATION OF THE CHARACTER IN QUESTION INVOLVED IN THAT AREA AND THE RESPONDENT CAN NOT FIND REFUGE FOR ITS VIOLATION OF SAID ACTS UPON THE GROUND, AS HELD BY THE CIRCUIT COURT, THAT ITS UNLAWFUL ACTS RELATED ONLY TO ITS LOCAL SALES AND THAT THE EFFECT THEREOF ON INTERSTATE COMMERCE WAS INSUBSTANTIAL, INCONSEQUENTIAL, AND REMOTE. IN AN ACTION FOR A VIOLATION OF THE SHERMAN ANTI-TRUST AND ROBINSON-PATMAN ACTS THE FACT THAT THE COMMERCE INVOLVED MAY BE SMALL DOES NOT RENDER THESE ACTS ANY LESS APPLICABLE THERETO.

(1)

It has long been settled by the decisions of this Court that where goods are sold and are thereupon transported in interstate commerce, the sale is as much a part of that commerce as is the transportation, provided only that the transportation be incidental to, and not simply the accidental result of, the sale. *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 42 S. Ct. 106, 67 L. Ed. 329; *National Labor Relations Board* v. *Bainblatt,* 306 U. S. 601, 59 S. Ct. 668, 83 L. Ed. 1014.

In the instant case the respondent owned and operated an ice plant in Bainbridge, Georgia. While it manufactured and sold its ice in Bainbridge and did not ship any of the same across state lines for the purposes of sale, it is undisputed that it did sell a part of its ice to railroads and truckers engaged in interstate commerce to be used in connection with and as a necessary part of such commerce. Since ice is a necessary adjunct of the interstate transportation of

perishable goods in interstate commerce, it follows that sales of ice for such purpose is not merely the subject of commerce but enters into the very means of transportation by which the burdens of traffic are borne. See the Interstate Commerce Act, 49 U. S. C. A. § 1 (3), which provides that "transportation . . . shall include . . . all services in connection with the . . . refrigeration or icing . . . of property transported." Thus, it is clear that the respondent in selling ice used in connection with the interstate transportation of goods was engaged in interstate commerce, and that such sales were made in the course of such commerce so that § 2 of the Sherman Anti-Trust Act and § 3 of the Robinson-Patman Act (15 U. S. C. A. §§ 2, 13a) are applicable thereto. See, *Hamlet Ice Co., Inc.* v. *Fleming* (4 Cir.), 127 F. 2d 165 (cert. den. 320 U. S. 761, 63 S. Ct. 29, 88 L. Ed. 454); *Southern United Ice Co.* v. *Hendrix* (6 Cir.), 153 F. 2d 689; *Atlantic Co.* v. *Walling* (5 Cir.), 131 F. 2d 518; *Fleming* v. *Atlantic Co.* (D. C. N. D. Ga.), 40 F. Supp. 654; *Gordon* v. *Paducah Ice Mfg. Co.*, 41 F. Supp. 980.

It is now well established that decisions relating to the permissible area of state taxation, many of which were cited by the respondent in its brief in the Circuit Court in support of its contention that it was not engaged in interstate commerce,[1] are not controlling with reference to the applicability of the Sherman Anti-Trust Act. See *Swift & Co.* v. *United States*, 196 U. S. 375; *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408, 63 S. Ct. 1142; *Binderup* v. *Pathe Exchange*, 263 U. S. at page 311, 44 S. Ct. at page 100, 68 L. Ed. 308.

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[1] *Department of Treasury of Indiana* v. *Wood Preserving Corporation*, 313 U. S. 62, 61 S. Ct. 885, 85 L. Ed. 1188; *Eastern Air Transport, Inc.* v. *South Carolina Tax Commission*, 285 U. S. 147, 52 S. Ct. 340, 76 L. Ed. 673; *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, 50 S. Ct. 169, 74 L. Ed. 504; *Puget Sound Stevedoring Co.* v. *State Tax Commission*, 302 U. S. 90, 94, 58 S. Ct. 72.

It is significant that after receiving information of a possible suit in violation of the Anti-Trust Acts, the President of the respondent instructed the Manager of its plant at Bainbridge to wait a few days and let the sign advertising ice to truckers at $4.00 per ton, disappear some night. It is also of some significance that at about the same time a form was adopted by the respondent for truckers to sign which showed their destination as being within the State of Georgia and the Manager of the Bainbridge plant was informed that if the drivers would sign the form, it would clear the respondent, these forms containing a statement that ice furnished would not be transported outside the State of Georgia. Of course, the respondent may have been simply being overly cautious, but we gain the impression that it was the respondent's belief that in selling ice which was used in connection with the interstate shipment of goods, it was engaged in interstate commerce, or, at least, that its conduct would necessarily have an "actual or threatened effect upon interstate commerce." *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 68 S. Ct. 996.

(2)

There is a vast difference between activities, the effect of which, if any, on interstate commerce may be said to be "insubstantial, inconsequential, and *remote,*" and activities which may be said to affect only an insubstantial and inconsequential amount of interstate commerce. The Circuit Court's opinion seems to embody, to some extent, both of these concepts.

Insofar as the decision of the court relates to the former it would seem to resurrect the "indirect" and "remote" doctrine that had its beginning in *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 15 S. Ct. 249, 39 L. Ed. 325, but

which has been effectively discarded by the recent decisions of this court. *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 68 S. Ct. 996.

In that case the court said:

> "The inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total economic process is now merely a preliminary step, except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented. For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a *showing of actual or threatened effect upon interstate commerce*, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence. If so, the restraint must fall, and the injuries it inflicts upon others become remediable under the Act's prescribed methods, including the treble damage provision." (Italics supplied.)

In *United States* v. *Columbia Steel, supra,* 334, U. S. 862, 68 S. Ct. 1107, it was said:

> "If it is interstate commerce that feels the pinch, it it does not matter how local the operation which applies the squeeze."

Thus, even assuming that the selling of ice for use in interstate traffic is not strictly an interstate transaction, though we insist that it is, it is clear that any attempt to monopolize such business, would affect whatever interstate traffic was involved in the area in question, substantially and directly, and that such conduct would constitute a violation of the Sherman Anti-Trust Act. In its decision, the Circuit Court quoted from the case of *United States*

v. *Frankfort Distilleries*, 324 U. S. at page 297, 65 S. Ct. at 663, 89 L. Ed. 951, as follows:

> "It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce."

Immediately following the language quoted by the Circuit Court, this court said further:

> "The cases relied upon by respondents (Industrial Association of San Francisco v. United States, 268 U. S. 64, 45 S. Ct. 403, 69 L. Ed. 849; Levering & Garrigues Co. v. Morrin, 289 U. S. 103, 53 S. Ct. 549, 77 L. Ed. 1062; United Leather Workers v. Herkert & Meisel Trunk Co., 265 U. S. 457, 44 S. Ct. 623, 68 L. Ed. 1104, 33 A.L.R. 566; cf. Local 167 v. United States, 291 U. S. 293, 297, 54 S. Ct. 396, 398, 78 L. Ed. 804, and United States v. Hutcheson, 312 U. S. 219, 61 S. Ct. 463, 85 L. Ed. 788) fall within this category. All of them involved the application of the Anti-Trust laws to combinations of businessmen or workers in labor disputes, and not to interstate commercial transactions. On the other hand, the sole ultimate object of respondents' combination in the instant case was price fixing or price maintenance."

It is clear, upon a consideration of the last quoted language of the court, which the Circuit Court did not refer to, that nothing said in the *Frankfort Distilleries* case supports the contention reached by the Circuit Court in the instant case. On the contrary, the statements of the court supports the view that the conduct of the respondent in this case involved a violation of the Sherman Anti-Trust Act. In the cases referred to by the court, the activities of the

defendants were intended to bring about a change in local conditions, and the means used to achieve the purpose did not directly touch upon interstate commerce. However, just as this court there said, the sole ultimate object of respondent's combination in that case was price fixing or price maintenance, it is equally true that the sole ultimate object of the respondent's conduct in the present case was the destruction of competition and the establishment of a monopoly. In other words, the respondent's conduct here directly concerns itself with prices of goods sold in connection with and used in interstate traffic. If the respondent, through its price activities, succeeds in its attempt to establish a monopoly, all of the interstate traffic in this area requiring the use of ice will have to depend entirely upon the respondent. The only thing remote about respondent's activities is that it is attempting to hide its real purpose under the camouflage of a simulated local retail price war in order to gain the end which they seek, namely, a monopoly in the sale of ice in the area in question both as to interstate and intrastate transactions.

(3)

The evidence in the instant case disclosed that the respondent sold ice in Bainbridge, Georgia, at prices lower than those exacted by the respondent elsewhere and that the price for which the respondent sold ice in Bainbridge was unreasonably low and at a loss to the respondent. There was much in the evidence to establish the fact that the conduct of the respondent was for the deliberate purpose and intention of suppressing competition by injuriously affecting petitioners as competitors and to establish a monopoly in and around the City of Bainbridge in the sale of ice. However, we need not belabor this point since this finding of the District Judge was accepted as true by the

Circuit Court in reaching its decision. The Circuit Court said that.

> "We accept the finding that the purpose of the price war was to suppress competition by injuriously affecting plaintiffs as competitors."

The conduct of the respondent in selling ice in Bainbridge, Georgia, at prices lower than those exacted by the respondent elsewhere and in selling ice at Bainbridge at an unreasonably low price and at a loss to the respondent with the intent of destroying competition and eliminating competitors and to establish a monopoly, constituted a violation of the specific provisions of the third section of the Robinson-Patman Act provided that the respondent was engaged in commerce and that such conduct was in the course of such commerce, and in thus attempting to establish a monopoly in the sales of ice in interstate commerce as well as locally the respondent was also guilty of a violation of Section 2 of the Sherman Anti-Trust Act (15 U. S. C. A. § 2).

In the case of *Schine Chain Theatres* v. *United States*, 334 U. S. 110, 68 S. Ct. 947, 92 L. Ed. 245, this court said:

> "There is also challenge to the finding that Schine cut admission prices. This seems uncontroverted. But price cutting without more is not a violation of the Sherman Act. It is indeed a competitive practice which this record shows to have been common in the industry. *It may be used in violation of the Act. Thus it may be the instrument of monopoly power to eliminate competitors or to bring them to their knees. But since it is not unlawful per se, facts and circumstances must be adduced to show that it was in purpose or effect employed as an instrument of monopoly power.*" (Italics supplied)

Here the Court specifically recognizes in effect that "price wars" and "red ink" campaigns entered into for the pur-

pose of suppressing and eliminating competition by destroying weaker competitors with the intent to establish a monopoly constitute a violation of the Sherman Anti-Trust Act. Such conduct is a violation of the specific terms of the Robinson-Patman Act.

In the case of *United States* v. *New York Great A & P Tea Co., Inc.*, 67 Fed. Supp. 626, the District Court said:

> "Defendants have the right to set prices at such figures as to meet competition. It is only when price cutting extends to destruction or unreasonable restraint of competition or taking losses in order to attain an ultimate monopoly or partial monopoly that the law is violated. If the methods employed are such as necessarily to employ a factor which reflects inevitably an intent to injure or destroy competition, we have something illegal."

In *Port Rican American Tobacco Co. of Porto Rico* v. *American Tobacco Co.* (2nd Cir.) 30 F. 2d 234, 236, the Court said:

> "Ruinous competition by lowering prices has been recognized as an illegal medium of eliminating weaker competitors. Standard Oil Co. v. United States, 221 U. S. 1, 31 S. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; United States v. American Tobacco Co., 221 U. S. 106, 31 S. Ct. 632, 65 L. Ed. 663."

(4)

It further appeared from the evidence that there was some, though admittedly not a vast amount, of interstate rail and motor vehicle traffic in and through Bainbridge, Georgia, which required the use of ice in such transportation and that the respondent sold ice to railroads and truckers in connection with such transportation. But it is said that the sales of ice by the respondent was small with reference to the amount of its purely local sales and that, therefore,

the cut price offensive maintained by the respondent was directed only to its local business and that the effect thereof, if any, upon interstate commerce was "insubstantial, inconsequential, and remote." The Circuit Court adopted this view.

However, we insist that the question of the applicability of the Sherman Anti-Trust and the Robinson-Patman Acts can not be resolved against the plaintiffs merely by labeling the commerce involved as insubstantial. In *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 67 S. Ct. 1560, 91 L. Ed. 2010, this court said:

> "But the amount of interstate trade thus affected by the conspiracy is immaterial in determining whether a violation of the Sherman Act has been charged in the complaint, Section 1 of the Act outlaws unreasonable restraints on interstate commerce, regardless of the amount of the commerce affected. United States v. Socony-Vacuum Oil Co., 310 U. S. 150, note 59, page 225, 60 S. Ct. 811, 846, 84 L. Ed. 1129; Apex Hosiery Co. v. Leader, 310 U. S. 469, 485, 60 S. Ct. 982, 987, 84 L. Ed. 1311, 128 A. L. R. 1044. And Section 2 of the Act makes it unlawful to conspire to monopolize 'any part' of interstate commerce, without specifying how large a part must be affected. Hence it is enough if some appreciable part of interstate commerce be the subject of a monopoly, a restraint or a conspiracy."

In *United States* v. *Paramount Pictures*, 334 U. S. 131, 68 S. Ct. 915, 936, 937, this court said:

> "Section 1 of the Sherman Act outlaws unreasonable restraints irrespective of the amount of trade or commerce involved (United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 224, 225, n. 59, 60 S. Ct. 811, 844-846, 84 L. Ed. 1129), and Section 2 condemns monopoly of 'any part' of trade or commerce. 'Any part' is construed to mean an appreciable part of interstate or foreign trade or commerce. United States v. Yellow

Cab Co., 332 U. S. 218, 225, 67 S. Ct. 1560, 1564, 91 L. Ed. 2010."

It is clear that the appreciable amount of commerce referred to in these decisions does not deal with any abstract conception of the quantity of commerce involved, nor any comparison with the amount of such commerce in the United States, nor even a comparison of such commerce with the amount of local commerce engaged in by respondent, but relates to the amount of interstate commerce involved in the particular area and place where the illegal conduct operates. In the *Yellow Cab Co.* case, *supra*, 332 U. S. 218, 67 S. Ct. 1560, 91 L. Ed. 2010, this court said:

> "Likewise irrelevant is the importance of the interstate commerce affected in relation to the entire amount of that type of commerce in the United States. The Sherman Act is concerned with more than the large, nation-wide obstacles in the channels of interstate trade. It is designed to sweep away all appreciable obstructions so that the statutory policy of free trade might be effectively achieved. As this court stated in Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co., 293 U. S. 268, 279, 55 S. Ct. 182, 185, 79 L. Ed. 356, 'The provisions of Sections 1 and 2 have both a geographical and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of things forming a part of interstate commerce.' "

In the case of *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 68 S. Ct. 1107, 92 L. Ed. 1533, this court further said in this connection:

> "We first lay to one side a possible objection to measuring the injury to competition by reference to a market which is less than nation-wide in area. The Sherman Act is not limited to eliminating restraints whose effects cover the entire United States; we have consistently held that where the relevant competitive

> market covers only a small area the Sherman Act may be invoked to prevent unreasonable restraints within that area. . . . It is the volume in the area which the alleged restraints affect that is important."

See also *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 68 S. Ct. 996; *United States* v. *Eastern States Retail Lumber Dealers Assn.*, 234 U. S. 600, 34 S. Ct. 951, 58 L. Ed. 4290; *Wickard* v. *Filburn*, 317 U. S. 1111, 63 S. Ct. 82, 87 L. Ed. 122; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 59 S. Ct. 668, 83 L. Ed. 1014; *William Goldman Theatres* v. *Loew's, Inc.* (3rd Cir.), 150 F. 2d 738; *Steers* v. *United States* (6th Cir.), 192 F. 1, and *O'Brien* v. *United States* (6th Cir.), 290 F. 185.

We respectfully submit that the conduct of the respondent as found by the District Court and which was fully supported by the evidence, clearly exhibited a violation of the provisions of the Sherman Anti-Trust Act, § 2, and the Robinson-Patman Act, § 3 (15 U. S. C. A. §§ 2, 13a). It is true that this case does not involve a vast amount of commerce such as has been presented in many cases before this Court. The amount of commerce involved is, in fact, less than the amount involved in any case which this Court has heretofore decided. The question of whether this Court will or will not review the ruling of the Circuit Court involves, as we see it, the question of whether or not small areas of interstate commerce are to be afforded the protection of the Sherman Anti-Trust and Robinson-Patman Acts and implicit in that question, whether a large corporation such as the respondent operating in many states and able and willing to carry on "red ink" and "price war" campaigns for the purpose of eliminating competitors and establishing a monopoly will be able to isolate its unlawful activities by showing that in the area involved its sales in interstate commerce are small as compared with the entire amount of such sales within its operations or as compared

with its purely local activities in that area and that, therefore, the effect of its conduct, if any, upon interstate commerce is "insubstantial, inconsequential, and remote" as ruled by the Circuit Court. It must be conceded that the use of ice is important to a large amount of interstate commerce throughout the United States and that though the amount of traffic so involved in a given area may be small, the total effect of competition in all such areas may be great. As recognized by this Court in *National Labor Relations Board* v. *Fainblatt, supra,* 306 U. S. 601, 59 S. Ct. 668,

> "There are not a few industries in the United States which, though conducted by relatively small units, contribute in the aggregate a vast volume of interstate commerce."

If the respondent in this case, operating as it does in several southeastern states, may with impunity attempt to monopolize the icing of interstate shipments of goods by engaging in "red ink" campaigns and "price wars" for the purpose of eliminating competition in violation of the Sherman Anti-Trust and Robinson-Patman Acts and at the same time shield itself behind the claim that the particular amount of commerce involved is small, either as regards the total amount of such commerce elsewhere or with regard to its purely local activities, it is evident that the respondent by thus eliminating competition will soon have a monopoly in this class of commerce which in the aggregate will be large. It must be remembered that in the instant case *all* of the interstate commerce passing throught the City of Bainbridge requiring the use of ice in connection therewith was and is involved in the conduct of the respondent in its effort to eliminate competition and establish a monopoly. It can hardly make any difference that the respondent is also engaged in purely local sales of ice and this constitutes the

greater part of its business. While small, the interstate traffic using ice as a necessary part thereof which flows through the City of Bainbridge and the sale of ice in such connection is not wholly insubstantial or inconsequential so as to be beyond the protection of the Anti-Trust Acts.

> "One small stoppage may not have an immediately perceptible effect upon the flow of the whole stream. But many small stoppages will have such effect. And like the small amount of grain in Wickard v. Filburn (317 U. S. 111, 87 L. Ed. 122) the power to regulate is not lost because of the small size of any individual contribution." *Shore* v. *Council* (3rd Cir.), 173 F. 2d 678, 681.

As was pertinently said by the 8th Circuit in *White Bear Theatre Corp.* v. *State Theatre Corp.*, 129 F. 2d 600, 605:

> "In principle, and within the intendment of the Sherman Act, public interest is as much concerned with the improper control of the interstate market, on the buyer's or seller's side, for the little town of White Bear Lake as for the great metropolis of New York City, or for any State, or for the country as a whole."

On the contrary, the evidence would clearly authorize the conclusion that there is a substantial amount of goods flowing in interstate commerce that passes through Bainbridge which requires the use of ice, and it is clear that all of this commerce will feel the pinch of the establishment of a monopoly by the respondent in the sale of ice in this territory.

The respondent insists that its total sales of ice in connection with interstate traffic is only 1% or less of its total sales, the remainder of which are purely local transactions. This was from records kept by the respondent. There was evidence, however, that cast doubt on the correctness of the records of the respondent in this connection. While the

evidence did not develop to a mathematical certainty the amount of ice sold by the respondent in connection with interstate traffic, it did warrant a finding that a much greater quantity of ice than that claimed by the respondent was sold by it in connection with that commerce. One merchant engaged in interstate transportation of perishable goods stated in an affidavit presented by the respondent that he used from 4000 to 4500 pounds of ice per week in his operations. This would amount to 130 tons of ice per year. There was creditable evidence that at least 10 to 15 interstate trucks were iced at Bainbridge each week during the produce and fruit season, each with approximately a ton of ice, and that the majority of them were iced by the respondent. There was also evidence that the respondent furnished the Seaboard Air Line Railway Company with approximately 1000 pounds of ice per day or approximately 182 tons of ice per year. It is not to be necessarily inferred from the evidence that this constituted all of the ice sold by the respondent in connection with interstate traffic. Nor is it to be necessarily inferred that the respondent was furnishing ice in connection with all of the interstate traffic in this area. In any event, it is a mistake to test the legality of the conduct of the respondent solely by the amount of ice that it sold in interstate commerce in relation to its local business. It is reasonable to assume that interstate traffic which would require even the amount of ice which the evidence specifically shows was sold by the respondent would represent a substantial amount of commerce, the aggregate of which in that and other areas even in the State of Georgia alone would be great. It is significant that the respondent thought that the interstate traffic involved in that area requiring the use of ice was substantial enough that it erected two signs on through interstate highways advertising ice to truckers. It is not at all absurd to suggest that the right of the petitioners to compete on a fair and equal basis with the respond-

ent for ice to be used in connection with interstate traffic may, to a substantial extent, bear on the question of whether the operations of the petitioner, which were admittedly small, shall be at a sufficient profit to warrant them to continue in the business of manufacturing and selling ice.

We respectfully submit that the decision of the Circuit Court in this case is not only in conflict with the decision of other Circuit Courts as herein set out, but that the decision is contrary to the principles enunciated by this Court in its recent decision in connection with the application of the Sherman Anti-Trust and Robinson-Patman Acts.

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

JULIAN WEBB,
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Counsel for Petitioners.